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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 380

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Petitioners,

v.

RUTLAND RAILWAY CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Second Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. .....

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated association, individually and as representative of the locomotive engineers employed by plaintiff; and A. S. McCARTHY, individually and as General Chairman of said organization; BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated association individually and as representative of the locomotive firemen and enginemen employed by plaintiff; and RICHARD DAVIES, individually and as General Chairman of said organization; BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, individually and as representative of the brakemen employed by the plaintiff; and F. J. ESPOSITO, individually and as General Chairman of said organization; ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, an unincorporated association, individually and as representative of the conductors employed by the plaintiff; E. K. STONE, General Chairman, and R. H. BROWN, individually and as Local Chairman of said organization,

Petitioners,

v.

RUTLAND RAILWAY CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Second Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on June 18, 1962.

OPINIONS BELOW.

The opinion of the District Court for the District of Vermont is copied at Vol. I, page 69a of the certified record accompanying this petition.[1] The District Court's Findings of Fact and Conclusions of Law and Judgment are reported in 188 F. Supp. 721 (1961). The opinion of the Court of Appeals for the Second Circuit is set forth in the Appendix *infra*, page 4 and is not yet officially reported.

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit was made and entered on June 18, 1962. No petition for rehearing was filed on behalf of petitioners. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

I. May, for purposes of 28 U. S. C. § 1391, a suit be brought against an unincorporated association, such as a labor union, in a judicial district in which the union does not maintain its headquarters or principal offices, on the theory that an unincorporated association should, like a corporate entity, be regarded as a resident of any judicial district in which it is doing business?

II. Did the submission by the railroad of its notice of November 2, 1959, under Section 6 of the Railway Labor

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[1] The Appendices to the Petitioners' and Respondent's Briefs in the court below (herein Vols. I and II respectively) have been certified as the Record for use with this petition, nine extra copies of which are filed herewith. By the use of two volumes, the original pagination has been retained. The Appendix to Petitioners' Reply Brief has been attached at the end of Vol. II as pp. 96a-99a thereof.

Act, in itself create a major dispute which required the carrier to maintain the status quo and to bargain in good faith on the question of running through existing crew terminals and creating a new crew terminal?

III. In the circumstances stated in Question No. II, did the carrier, regardless of any rights it may have had under existing agreements, violate Section 2, First and Section 6 of the Railway Labor Act when it abolished existing home crew terminals and bulletined trains to run through such terminals while negotiations over the proposed rules in regard to these matters submitted in the Section 6 Notice were still in progress?

IV. May a strike by the carrier's employees against unilateral changes in working conditions at the time a dispute over the carrier's right to make such changes is being processed by the carrier under the Section 6 procedures of the Railway Labor Act be enjoined as being in contravention of Sections 1 and 8 of the Norris-LaGuardia Act?

V. In the circumstances stated in Question No. IV, may the bargaining representatives of the employees obtain an injunction requiring the carrier to maintain the status quo prescribed by the carrier's Section 6 Notice?

VI. Does a carrier's claim allegedly based on a question of managerial prerogative, which is submitted to the National Railroad Adjustment Board after the start of a strike by the carrier's employees and which submission cannot terminate the dispute since it is incomplete, create a labor dispute in regard to which a strike by the employees is prohibited by the Railway Labor Act, or does the Norris-LaGuardia Act deprive the court of jurisdiction to enjoin a strike under these circumstances?

STATUTES INVOLVED.

The statutes involved are the provisions of Section 2, First, Second, and Sixth and Section 6 of the Railway Labor Act (45 U. S. C. 152, First, Second and Sixth and 156); which are printed in the Appendix at page 1, *et seq.*, and Sections 1, 8 and 13 (c) of the Norris-La-Guardia Act (29 U. S. C. 101, 108 and 113 (c)), which are printed in the Appendix at page 3. The provisions of 28 U. S. C. 1391 (b) and (c) are involved in the issue relating to venue and are printed in the Appendix at page 4.

STATEMENT OF THE CASE.

Respondent Rutland Railway Corporation operated its railroad system under collective bargaining agreements with the petitioners, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors and Brakemen, as the duly recognized representatives of its operating employees. The five individual petitioners named herein are either general or local chairmen of one of the above mentioned Brotherhoods.

The Rutland Railway's operations are divided into three subdivisions. One subdivision runs from the New Hampshire border at Bellows Falls, Vermont, to Rutland, Vermont. The main subdivision runs northerly from White Creek Junction, New York, through Rutland, Vermont, and Burlington, Vermont, to the northern tip of Lake Champlain, at Alburg, Vermont. At Alburg the road proceeds westerly across Northern New York, through Malone and Norwood, New York, to Ogdensburg, New York, a distance of 122 miles. Malone is half way between Alburg and Ogdensburg. Norwood, between Malone and Ogdensburg, is 35 miles from the former and 5 miles from

the latter. The instant proceeding concerns the Ogdensburg Subdivision which stretches from Alburg, Vermont, to Ogdensburg, New York (Vol. II, 3a-4a).

On November 2, 1959, respondent carrier served a notice pursuant to Section 6 of the Railway Labor Act in which it proposed, among other things, to change all existing agreements and rules which would prevent it from consolidating and abolishing crew terminals, merging seniority districts and establishing interdivisional and intradivisional runs (Vol. II, 50a). The pertinent parts of the Section 6 Notice are copied at Vol. I, pages 67a-69a.

On November 30, 1959, conferences between the representatives of the Rutland and of the Brotherhoods were commenced in order to consider the proposals contained in the Section 6 Notices. The parties failed to reach agreement on any of the proposals and the conferences were recessed. The carrier then delegated authority to the Carriers' Eastern Conference Committee to further confer on behalf of the Rutland and other similarly situated railroads, and the labor representatives delegated their authority to the National Conference Committee of the four Brotherhoods. National conferences on the Section 6 Notice of the carriers and the counterproposal of the employee representatives were suspended when the Presidential Railroad Commission was established on November 1, 1960. This Commission rendered a report and recommendations on February 28, 1962. No agreement has been reached between the parties on the railroad's proposals to change all rules preventing consolidation of crew terminals, merger of seniority districts and establishment of interdivisional or intradivisional runs.

Prior to the tendering of the aforesaid Section 6 Notice of November 2, 1959, and continuing thereafter until September 17, 1960, the respondent operated four trains

and two switchers on the Ogdensburg Subdivision. Two of the trains were through freights operating daily in opposite directions between Alburg and Norwood. The home or crew terminal of one was Alburg. The home or crew terminal of the other was Norwood. The two remaining trains were turn around local freights which operated daily out of Malone with Malone being the home or crew terminal for both runs. One train went to Ogdensburg and returned each day; the other, to Alburg and return (Vol. II, 4a-6a).

On September 8, 1960, the railroad posted bulletins which abolished the existing work schedules and reduced the number of runs effective September 16, 1960. The four existing daily freight runs on the Ogdensburg subdivision were to be replaced by two, running daily between Alburg and Ogdensburg in opposite directions. The two new trains operated through the home-crew terminal for local freight previously located at Malone and replaced it with new home terminals at Alburg and Ogdensburg (Vol. II, 6a). The new schedule eliminated ten of the thirty jobs of operating employees in the subdivision (Vol. II, 45a).

Prior to the instant dispute management had recognized on many occasions its duty to negotiate on the establishment of new runs and changes in runs (other than time schedule changes) due to the impact the changes would have on terminals, seniority, jobs, rates of pay and constructive allowances to the employees as a class. The respondent had never changed a terminal without negotiations and agreement with the Brotherhoods (Vol. I, 38a, 40a-41a). On August 30, 1960, immediately prior to the preparation and posting of the advertisement bulletins and notice involved herein, the respondent, in negotiations on wages which were the subject of another dispute only indirectly connected to this instant dispute, requested the

change of five "rules" in exchange for the wage increases agreed upon at the National Arbitration of 1960 (Vol. I, 59a-61a; Vol. II, 69a-70a). Proposed change No. 5 requested provision "for operation of trains between assigned terminals so that wage payments will equal the miles run and/or an eight hour day." Petitioners contended at the district court hearing that management explained that change No. 5 meant the right to operate through established terminals. The district court refused to make this finding. The August 30 conference at which this incident transpired ended without any agreement.

The carrier took an adamant position and refused to bargain. It contended that the proposed changes were strictly within its managerial perogative. In support of its position that terminals could be unilaterally changed, the respondent pointed to several provisions in its agreements with the petitioning Brotherhoods which it asserted granted it the right to act unilaterally. One provision was Article 39(a) of the agreement with the Order of Railway Conductors and with the Brotherhood of Railroad Trainmen. The provision states (Vol. II, 22a):

> "(a) All vacant or new runs will be posted on the division on which they occur within five (5) days, to close within five (5) days, and to be assigned to the oldest bidder within ten (10) days, merit, fitness and ability to be considered. In case of men being away when run is advertised, when reporting for duty their claims to the run will be considered if a junior man has been assigned, if such claim, in writing, is made within five (5) days."

The language of Article XXXVII(a) in the carrier's agreement with the Brotherhood of Locomotive Engineers, and that of Article 39(a) in the agreement with the Brotherhood of Locomotive Firemen and Enginemen, is

essentially the same as in the article quoted above. Also Article 39(e) in the agreement with the Conductors and Trainmen states (Vol. II, 21a):

> "(e) When established runs are changed to operate out of different terminals, schedules changed two (2) hours or more, twenty (20) miles or more, or the layover of such runs changed, they will be considered new runs and bulletined as such."

On September 15, 1960 the Brotherhoods notified the railroad that they would engage in a strike if the carrier instituted the proposed changes on the Ogdensburg Subdivision. The telegram sent to the carrier stated that the union would go on strike at 12:01 A. M., September 16, due to the arbitrary conduct of the railroad in changing home terminals and running through former terminals.

The railroad replied by telegram which stated in part as follows:

> "Rutland Railway Corporation effective September 17, 1960, will arrange train assignment to conform to the demands of traffic. The change is not and cannot be shown to have violated any rule or agreement as alleged. No agreement has been violated and the carrier is merely exercising its right to operate in an economical manner. Conferences on this issue have not been held on the property with the (Brotherhoods)." (Vol. I, 72a-73a; Vol. II, 26a.)

The employees did institute strike action on September 16, 1960 (Vol. II, 24a).

On September 26, 1960, the railroad filed a complaint requesting an injunction and damages against the petitioners on the grounds that the strike was illegal as in derogation of the Railway Labor Act and an improper attempt to usurp legitimate managerial prerogatives (Vol. I, 2a). As part of its complaint, respondent alleged that it

would submit the matters in dispute to the National Railroad Adjustment Board on or about September 30, 1960. Subsequently, four days after filing the complaint, the respondent did make an ex parte submission to the Adjustment Board (Vol. II, 20a-21a). In its submission to the Board, the respondent stated its claim as follows:

> "There are no restrictions under the existing agreements which prohibit carrier from establishing runs, abolishing runs, changing runs to operate out of different terminals to conform to the demands of traffic and operating in an economical manner when there is a falling off of business" (Submission, pp. 1-2).

On October 7, 1960, the petitioners moved to dismiss the action on the ground of improper venue (Vol. I, 6a). This motion was denied on October 10, 1960. The petitioners answered and filed a counterclaim in which they requested an injunction preventing the respondent from putting into effect the schedule of changes set forth in its advertisement bulletins of September 8, 1960 (Vol. I, 19a).

After holding hearings on the merits the District Court enjoined the strike. Consideration of damages was reserved to a later date. The court made findings of fact and conclusions of law and entered a judgment order (Vol. I, 69a *et seq.*). The petitioners moved for additional and amended findings (Vol. I, 78a). The court denied the major portion of the petitioners' motion, but the court did change some of its original findings in a manner directly opposed to petitioners' requests (Vol. I, 83a-84a).

Petitioners appealed from the judgment of the District Court to the United States Court of Appeals for the Second Circuit which reversed and remanded for further proceedings to determine whether the railroad made

reasonable efforts to settle the dispute in conference (Appendix, p. 4). The premise enunciated in the majority opinion of the Court of Appeals is that the Norris-LaGuardia Act requires the carrier to make reasonable efforts to settle a minor dispute, which it found this dispute to be, and that therefore, the lower court should not issue an injunction until the carrier, in compliance with this obligation, conferred with the unions. If the carrier had conferred or taken some undefined steps, the strike was enjoinable. Under this view, the petitioners' request for an injunction against the carrier's unilateral changes could not be substantiated. The district court's findings in regard to the counterclaim were, therefore, affirmed.

REASONS FOR GRANTING THE WRIT.

The judgment rendered by the Court below on the question of Federal Law in regard to the venue of an unincorporated association should be reviewed by this Court because the decision is in conflict with the applicable decision of another Court of Appeals affecting the interpretation of 28 U. S. C. § 1391.

The petitioners Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors and Brakemen are unincorporated associations and labor unions within the meaning of the Railway Labor Act and represent the respective crafts of employees of the respondent carrier. The residence and headquarters of the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Railroad Trainmen are at Cleveland, Ohio (Vol. I, 7a, 11a, 14a). The residence and headquarters of the Order of Railway Conductors and Brakemen is at Cedar Rapids, Iowa (Vol. I, 28a). As this

action arises under the Railway Labor Act, the relevant venue provision is 28 U. S. C. § 1391(b):

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

On the basis of the above section, the petitioning Brotherhoods contend that, being unincorporated associations, proper venue in any action against any one of them lies only in the judicial district where its principal headquarters are located.

The decision rendered below, however, declares that an unincorporated labor association may be sued in any judicial district in which it may be regarded as "doing business." This concept adopts the statutory treatment provided for an action against a corporation under 28 U. S. C. § 1391(c).

The decisions are divided on whether for venue purposes an unincorporated association resides only at its principal place of business or whether it may be accorded treatment similar to that used in determining corporate residence. Many courts, including the Court of Appeals for the District of Columbia Circuit, have held that for determining venue an unincorporated association resides only at its principal place of business. *Brotherhood of Locomotive Fireman v. Graham*, 175 F. 2d 802 (D. C. Cir. 1948), rev'd. on other grounds, 338 U. S. 232 (1949); *Cherico v. Brotherhood of Railroad Trainmen*, 167 F. Supp. 635 (S. D. N. Y. 1958); *McNutt v. United Gas Workers*, 108 F. Supp. 871 (W. D. Ark. 1952); *Griffin v. Illinois Cent. RR*, 88 F. Supp. 552 (N. D. Ill. 1949); *Salvant v. Louisville & Nashville RR*, 83 F. Supp. 391 (W. D. Ky. 1949). In other cases it has been held that

an unincorporated association may be sued in any district in which it is doing business. *American Airlines Inc. v. Airline Pilots Association*, 169 F. Supp. 777 (S. D. N. Y. 1958); *Eastern Motor Express, Inc. v. Espenshade*, 138 F. Supp. 426 (E. D. Pa. 1956); *Portsmouth Baseball Corp. v. Frick*, 132 F. Supp. 922 (S. D. N. Y. 1955).

The judgment of the court below, if permitted to stand, clearly obviates the statutory distinction for purposes of venue of residence for corporations from other entities as provided in 28 U. S. C. § 1391 (b) and (c). These petitioners do not conceive that Congress intended that the residence of unincorporated associations be assimilated to that of corporate entities when Congress has separated the two forms of enterprises in the statute and set forth different requirements for each. The question involved has not been, but should therefore be, settled by this Court.

The Court Below Has Rendered a Judgment Deciding an Important Question Under the Railway Labor Act Seriously Affecting Labor Relations in the Railroad Industry Which Should Be Reviewed by This Court.

The majority opinion of the court below declares that where, pursuant to Section 6 of the Railway Labor Act, 45 U. S. C. § 156, a rail carrier serves a notice of termination of certain clauses in a collective bargaining agreement and the insertion in place thereof of a rule that the carrier would have the unconditional right to establish, move, consolidate and abolish crew terminals or the right to operate through any existing crew terminal, any subsequent unilateral changes by the carrier establishing new runs which changed certain crew terminals and operated through other existing terminals creates a minor dispute covering the extent of managerial prerogative in regard

to these matters. The position was taken that the pertinent provisions of the contract subject to the Section 6 Notice were ambiguous but sufficiently indicated to the court that the existing agreement could be considered to have preserved management's right to unilaterally make changes in train runs thereby permitting it to alter home or crew terminals. In view of the aforesaid ambiguity, the court held that an injunction could be issued against a strike in this labor dispute to protect the jurisdiction of the National Railroad Adjustment Board if it is found on remand that the respondent carrier made reasonable efforts to "confer" on this dispute. Efforts at "negotiation" were not found necessary in this situation. The petitioners' counterclaim requesting an injunction against the unilateral changes undertaken by management prior to completion of the so-called "major" dispute provisions of the Railway Labor Act was dismissed.

The dissenting member of the court below, however, advanced the theory that the Section 6 Notice served by the carrier on November 2, 1959, created a major dispute to be resolved by collective bargaining and ultimately, if necessary, the use of economic force upon compliance with the mandatory procedural requirements of the Railway Labor Act. This opinion asserted that the respondent, upon reaching the belief that it could not secure what it desired through the processes of collective bargaining, violated the provisions of the Railway Labor Act by unilaterally making the same changes it sought in its Section 6 Notice. The minority of the court would have enjoined the respondent carrier's action.

The decision herein is significant in that the factual situation is of national importance involving substantially all of the major railroads of the country in that they served Section 6 and contract termination notices corre-

sponding to those submitted by the respondent railway. These notices are still pending. They are involved not only in the current national rules movement, but also in the numerous proposals for consolidations and mergers which are the order of the day.

More importantly, the decision below results in the erosion of Section 6 of the Railway Labor Act. Under this view there can never be a major dispute if the relevant contractual provision in effect at the time of the service of the Section 6 notice is ambiguous, but clearly governing. This test will also compound the difficulties presently confronting the judiciary from the major-minor dispute distinction.

Although the Railway Labor Act contains no reference to major-minor disputes, these labels were created in the oft-quoted opinion of Justice Rutledge in *Elgin, J. & E. Ry. v. Burley*, 325 U. S. 711 (1945). While originally providing simplicity of expression, the major and minor aspects have culminated in confusion and hardship through the attempted categorization and association of each dispute which thereby diagnoses the dispute's future handling. As the result of this confusion, the processing of a dispute stems from the framing of it or the treatment given the dispute by the first party to invoke the procedures of the Railway Labor Act. *Norfolk and Portsmouth Belt Line R. R. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34, 46 (4th Cir. 1957); see Comment, *Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes*, 60 Col. L. Rev. 381, 394-396 (1960). Under this view, by merely submitting any dispute to the Adjustment Board, a minor dispute can always be found in accordance with the rationale of *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957). However, this Court in the *Chicago River* case did not

have before it a situation where a Section 6 Notice was outstanding, where the claim submitted to the Adjustment Board was taken after a strike was instituted, and where the submission did not present the entire dispute for adjudication by the Adjustment Board. By finding a minor dispute based upon any ambiguity in a referrable clause in the existing agreement, a system of compulsory arbitration has been imposed upon the employees in the railway industry in every controversy which is appropriately framed by the carrier. This theory receives no sanction from the language of the Railway Labor Act or in its legislative history.

The fallacy of these decisions of the lower federal courts in misapplying the *Chicago River* rationale can be demonstrated by the facts in the instant case. On November 2, 1959, the respondent served notice that it wanted to terminate and abolish all restrictive provisions and practices in regard to establishment of new runs and wanted to insert a new clause granting it the sole authority to change crew terminals. On September 8, 1960, while the Section 6 proposals were still in negotiation, the carrier notified the unions of its intention unilaterally to establish new runs, thereby changing some crew terminals and operating these runs through other established terminals. However, Section 6 of the Railway Labor Act reads in part:

> "In every case where such notice of intended change has been given, or conferences are being held with reference thereto * * * rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act * * *." (45 U. S. C. 156.)

Thus the carrier's subsequent unilateral changes were in violation of the Act. Nevertheless, by submitting the

controversy involving the unilateral action to the Adjustment Board, the dispute was considered a minor dispute. Under the view adopted by this decision, the employees are forced to accept the drastic changes imposed upon them through an assertion of managerial perogative and without the assistance of collective bargaining. They are forced to accept a forum which commonly has "long-delayed decisions." *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. R.*, 363 U. S. 528, 534 (1960). A decision by the Adjustment Board in favor of these petitioners years after the arbitrary action of the respondent in contravention of the Railway Labor Act would be "but an empty victory". *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. R., supra.*

Hilbert v. Pennsylvania R. R., 290 F. 2d 881 (7th Cir. 1961), *cert. den.* 368 U. S. 900 (1961), is the foremost example of the unlimited use of the major-minor distinction and the impracticability of the holding of the court below that Section 6 is inoperative where there is an allegedly ambiguous, but clearly governing, provision in the existing bargaining agreement. In that case, as here, the same Section 6 Notices were involved with the same issue of home-crew terminals. There, however, a specific rule of the collective bargaining agreement stated:

> "5-P-1. Established terminals will not be changed nor new terminals created except by agreement between the interested local chairman and the superintendent." (290 F. 2d 881, 883.)

The plaintiff therein sought an injunction to prevent the carrier from unilaterally changing home-crew terminals. The court held that the dispute involved a conflict over the interpretation or application of the existing contract and was thus a minor dispute. The request for the injunction was refused. The plaintiff was advised that the

Adjustment Board was the proper forum for a decision in that case although the contract clearly required the carrier to meet and treat in regard to terminals. On the basis of the test expressed by the Court of Appeals for the Second Circuit in the instant case, the *Hilbert* case would necessarily have involved a major dispute (Appendix, p. 25). But *Hilbert* is heavily relied on by the court below in reaching its conclusion that the dispute is minor. Your petitioners contend that the above matters disclose an erroneous concept of Section 6 by the courts in both the *Hilbert* case and the case herein.

The crucial and appalling significance of the decision is that it culminates in a philosophy which limits free and full collective bargaining and withdraws from the railway industry the statutory declared federal policy furthering the right to strike.

It is petitioners' understanding that the right to strike has been limited only to the extent that the Norris-LaGuardia Act had been found not to prevent the issuance of an anti-strike injunction. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957). The holding in that case, however, clearly indicated that it was only applicable to minor disputes. The scope of the limitation on strikes was alternatively stated in the following terms: "The Norris-LaGuardia Act has been held to prevent the issuance of an injunction of a railway labor case involving a 'major dispute.' *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co. supra*, 42 at fn. 24.

As previously noted, however, due to the nature of the major-minor distinction, the dispute may always be framed by the carrier as dependent on an ambiguous contractual provision or by submitting the dispute to the Adjustment

Board. Thereupon the courts have classified these disputes as minor. See *Rutland Railway v. Brotherhood of Locomotive Engineers*, ____ F. 2d ____ (Appendix, p. 29). It is respectfully submitted that the resulting unhampered and unilateral changes by carrier managements are not authorized by the decision of this Court in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., supra.* Unwittingly, the decisions following the *Chicago River* case have expanded the concept of management prerogative and have narrowed the area in which collective bargaining is required. The formidability of the basic theory is now fully comprehended where, as in the present case, pertinent Section 6 Notice was effective and pending.

The court below recognized that the basic dispute, whether major or minor, involved the scope of the railroad's managerial prerogative (Appendix, p. 25). Nevertheless, the court below failed to recognize that management refused to bargain on the subject matter on the basis that being within its prerogative the unions had no function or responsibility in this area. The text of management's Section 6 proposal to completely dispense with collective bargaining on these matters further indicates a disposition of this carrier not to bargain in violation of Sections 2, First and 6 of the Railway Labor Act. If recognition as bargaining representative is to be given its statutory meaning, the employer must afford the representative an opportunity to negotiate concerning the determination of responsibility for decisions on the subjects involved in this case, and also any proposed change in the existing terms of employment. In other words, the problem involved was properly one for the Section 6 procedures as originally taken by management. However, not only did the carrier violate the aforesaid principles, but it further made unilateral changes while the unions ere

bargaining with it. This action of the carrier clearly interfered with normal collective bargaining thereby violating Section 6 of the Railway Labor Act. *Cf. May Department Stores Co. v. NLRB*, 326 U. S. 376, 385 (1945).

Therefore, the question arises as to whether or not a railroad such as respondent can issue a Section 6 Notice eliminating all agreements in regard to train runs and establishing and changing home-crew terminals and proposing new agreements with respect to these matters, among many others, and thereafter abolish and place into effect the same identical working conditions in spite of the express language in the Act, that:

> "In every case where such notice of intended change has been given, or conferences have been held with reference thereto, * * * rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 5 of this Act * * *." (45 U. S. C. 156.)

This is an important federal question which has not been resolved by this Court and it is important that the same should be settled for the benefit of both labor and management in the railway industry.

The Judgment Below Has Decided A Federal Question In A Manner In Conflict With Applicable Decisions of This Court.

A decision involving a similar dispute is *Order of Railroad Telegraphers v. Chicago & N. W. R. R.*, 363 U. S. 330 (1960). In that case the carrier sought to close a number of stations and thereby reduce employment of telegrapher employees. The bargaining representative for the telegraphers served a Section 6 Notice on the carrier which required the railroad to bargain in regard to the

elimination of jobs. The carrier refused to meet with the union on the ground that the subject matter was exclusively for the determination of management and furthermore was a minor dispute concerning the application or interpretation of the contract. However, this Court stated the following (p. 341):

> "Only a word need be said about the railroad's contention that the dispute here with the union was a minor one relating to an interpretation of its contract and therefore one that the Railway Labor Act required to be heard by the Railway Adjustment Board. We have held that a strike over a 'minor dispute' may be enjoined in order to enforce compliance with the Railway Labor Act's requirement that minor disputes be heard by the Adjustment Board. *Brotherhood of R. Trainmen v. Chicago River & I. R. C.*, 353 U. S. 30, 1 L. ed. 2d 622, 77 S. Ct. 635. *But it is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement,* rather than to mere infractions or interpretations of the provisions of that agreement. * * *" (Our emphasis.)

The majority opinion below conceded that the *Telegraphers* case, *supra*, presented the court with great difficulty in reaching its conclusion, but contended that the decision rendered was not in conflict with this Court's holding in the former case. (Appendix, pp. 30-31.) The lower court also acknowledged its uncertainty as to the basis of the *Telegraphers* case.

The minority opinion rendered below specifically directed itself to this point. It noted that while the majority recognized the bargainability of the subject matter involved in the dispute, it failed to realize that the only manner in which a contract in the railroad industry can be terminated for purposes of collective bargaining, except by mutual agreement, is by issuance of a Section 6 Notice

(Appendix, pp. 51-52.) This action in the case at bar was taken by the carrier itself on November 2, 1959.

If the decision in the *Telegraphers* case, where a major dispute was found to exist, is to have any meaning, then a major dispute was presented by the facts in the instant situation. The only feature which distinguishes the *Telegraphers* case from the *Chicago River* case and the cases which have followed it is the Section 6 Notice. Thus, *In the Matter of Hudson & M. R. R.*, 172 F. Supp. 329 (S. D. N. Y. 1959), *aff'd per curiam sub nom. Stichman v. General Grievance Committee of the Brotherhood of Railroad Trainmen*, 267 F. 2d 941 (2nd Cir. 1959), *cert. den.* 363 U. S. 843 (1960); *Norfolk & P. B. L. R. R. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (4th Cir. 1957), *cert. den.* 355 U. S. 914 (1958); *Missouri-Kansas Texas R. R. v. Brotherhood of Locomotive Engineers*, 266 F. 2d 335 (5th Cir. 1959), *rev'd on other grounds*, 363 U. S. 528 (1960); *Baltimore & O. R. R. v. United R. Workers*, 271 F. 2d 87 (2nd Cir. 1959), *vacated and remanded on other grounds* 364 U. S. 278 (1960), cited by the court below in support of its holding, are cases which did not involve a pending Section 6 Notice. The conflict between the decision in this case and that rendered by this Court in the *Telegraphers* case is emphasized when it is realized that in the instant controversy the respondent took the initiative and the advantage by serving the Section 6 Notice of November 2, 1959. This notice thereupon set forth a dispute for which "rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon" as required by Section 5 of the Act. In spite of the fact that the parties were still negotiating with respect to the Section 6 Notice, respondent issued advertising bulletins and notices which altered the rules or working conditions in violation of the status quo provisions of the Railway Labor Act. These circumstances

point up the distinction between the case at bar and the group of cases cited previously which have found a minor dispute in accordance with the *Chicago River* doctrine. A perusal of these cases, in conjunction with the facts herein, establishes that the *Telegraphers* case is most applicable here and that the judgment rendered by the court below is in conflict with this Court's holding in the *Telegraphers* case.

The decision below also conflicts with the findings of this Court in the recent case of *Sinclair Refining Co. v. Atkinson*, 370 U. S. 238, 8 L. ed. 2d 440 (1962). While that case involved the effect of Section 301 of the Labor Management Relations Act (29 U. S. C. 185) on a strike allegedly in violation of a labor contract, the views expressed indicate a review of the decisions of the lower federal courts in regard to the right to strike under the Railway Labor Act is required. This Court's opinion recognized that a mandatory injunction to require arbitration may be based on different and unrelated considerations from those involved in seeking an injunction against a strike in violation of arbitration procedures or against the exercise of economic force employed to circumvent the enforcement of an agreement to arbitrate grievance disputes. Petitioners believe that the basis of the holding indicates that the right to strike has been unnecessarily curtailed in the railway industry.

This Court considered that *Brotherhood of Locomotive Trainmen v. Chicago River & Indiana R. Co., supra*, enjoined a strike "in defiance of an affirmative duty" because the Railway Labor Act compelled unions "to settle disputes as to the interpretation of an existing collective bargaining agreement" by submission to the Adjustment Board. *Sinclair Refining Co. v. Atkinson, supra*, 450. If this analysis of *Chicago River* was correct, petitioners believe that the corollary must also follow. In other words,

these expressions by this Court indicate that a carrier cannot engage in unilateral self-help where an affirmative duty is placed upon it by Section 6 of the Railway Labor Act. Where the carrier violates this duty by changing the status quo during negotiations on the subjects contained in its notice, the unions should be entitled to engage in self-help. (29 U. S. C. 113(c)) In addition, petitioners contend the decision below fails to acknowledge that for purposes of this proceeding there was no existing contract which required the holding in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., supra,* to govern disposition of this case.

Furthermore, assuming for purposes of argument only that the instant dispute can be labeled "minor", the decision of the Court of Appeals for the Second Circuit is in conflict with this Court's decision in *Manion v. Kansas City Terminal Ry.*, 353 U. S. 927 (1957). In that case the railway petitioned the Missouri state court for an injunction forbidding its engineers and firemen to engage in a strike in support of efforts by their collective bargaining representatives to negotiate a settlement of time claims and grievances. *Kansas City Terminal Railway v. Manion,* 297 S. W. 2d 31 (Mo. App. 1956). Neither the railway or the employees submitted grievances to the National Railroad Adjustment Board. The Kansas City Court of Appeals issued the requested injunction on the basis that a strike over time claims was a violation of the Railway Labor Act and that such a dispute was minor. The case ultimately reached this Court on certiorari. In a *per curiam* opinion, the judgment of the Missouri state court was vacated.

At this point, it should be noted that the only important distinction between the factual situations in the *Chicago River* case and the *Manion* case was that the grievances which led to the threatened strike in the

Chicago River case were submitted to the Adjustment Board before the strike began, while the grievances in the *Manion* case were not submitted to the Board. As previously shown in the instant case, the submission to the Board was not made until the strike had been in effect for two weeks and after the instant action had been filed. Furthermore, the submission made by the carrier was incomplete in that any answer to the issue submitted cannot entirely settle the dispute involved. While the carrier asked the Adjustment Board as to whether there were any restrictions under the contract prohibiting it from modifying runs, including the changing of runs to operate out of different terminals, where business had been reduced, the question in the dispute herein is whether management is required under the contract and past practices to negotiate on any abolition or change in home-crew terminals and the creation of new terminals, including changes in established rates of pay, rules and working conditions, regardless of the carrier's economic position. Whether or not there are any restrictions in the contract on the changing of runs does not determine the dispute over the question of whether the carrier has the sole prerogative to abolish, change or establish home-crew terminals and any matters incidental thereto.

This distinction between the *Manion* and *Chicago River* cases points up the petitioners' contention that a belated and incomplete submission to the Adjustment Board may not convert a dispute into a minor dispute. If these decisions hold that the commencement of a strike over a dispute is unlawful while the dispute is pending before the Board, the submission by this carrier did not give the Board jurisdiction over the dispute involved in the strike. The dispute was not and is not pending before the Board. An injunction was therefore not necessary in this case to protect the primary jurisdiction of the Board. The same

result is reached if the basis of these decisions is that the carrier had an adequate administrative remedy which was to be used before requesting injunctive relief in that the carrier has never submitted to the Adjustment Board the dispute involved in this strike.

Therefore, whether the facts establish a dispute which is considered major or minor, the judgments below have decided the question in a manner in conflict with the applicable decisions of this court.

The Judgment Submitted In This Case Is In Conflict With That In A Similar Case Decided By Another Court of Appeals.

In the courts below, the petitioners relied heavily on the case of *Butte, A. & P. Ry. v. Brotherhood of Locomotive Firemen & Enginemen*, 268 F. 2d 54 (9th Cir. 1959), *cert. den.* 361 U. S. 864 (1959), to support their construction of the Railway Labor Act. The Court of Appeals for the Second Circuit declined to follow this view of the law. It contended that the *Butte* case was inapplicable on its facts.

Except for an attempted withdrawal of a pending Section 6 Notice, the situation in the *Butte* case was substantially the same as is presented here. There the railway served a Section 6 Notice proposing an amendment of its existing agreements with the Brotherhood to permit the loading of ore in a certain yard with mainline crews instead of yard crews. This proposal was rejected by the bargaining representative. The carrier then served another Section 6 Notice proposing to reduce the number of employees in the crews working at this yard. The proposal was likewise rejected and was submitted to mediation. While the Section 6 proposals were in mediation, the carrier advised the Brotherhoods that it was going to use crews employed by its parent corporation to do the switch-

ing at the yard. Shortly thereafter the unions notified the carrier that the employees represented by them would go out on strike if other crews were used. Two days later the carrier notified the Adjustment Board of the dispute and requested it to "accept jurisdiction and docket." The adjustment Board advised the railroad that the matter was not properly submitted for jurisdiction to be accepted. The submission was evidently never perfected.

On these facts, the courts held that the dispute which led to the strike threat was a major dispute which was being processed under the Section 6 procedures. It was further found that the status quo provisions activated by the Section 6 notice were circumvented by the carrier's unilateral action in using the three man crews of its parent corporation. Therefore, an anti-strike injunction was found prohibited.

In the *Butte* case the railroad specifically requested a change in existing agreements. At that time there was no question raised by the carrier as to the interpretation of existing agreements. When it could not obtain the proposed concessions through collective bargaining, it unilaterally made indirect arrangements to accomplish the same things requested in its Section 6 Notices.

There is no distinction between that situation and the instant case, for this carrier circumvented the Section 6 procedures by placing into effect the same changes which it sought in its Section 6 Notice of November 2, 1959. The submission to the Adjustment Board could not change the basic nature of this dispute. It is the contention of the petitioners that a major dispute should also have been found on these facts.

In view of the conflict in the cases coming before the various Courts of Appeal in regard to the effect of a Section 6 Notice and the meaning of a major dispute for

purposes of the Railway Labor Act and the Norris-La-Guardia Act, it is believed that this Court should provide definitive standards by the settling of the questions submitted in this case.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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